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Proving that Over Age Sixty is Over the Hill for Police Officers: EEOC v. Pennsylvania

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PROVING THAT OVER AGE SIXTY IS OVER THE HILL FOR POLICE OFFICERS: *EEOC v. PENNSYLVANIA*

Congress enacted Title VII of the Civil Rights Act of 1964 ("Title VII")[1] in an effort to prohibit employment discrimination based on race, color, religion, sex, or national origin.[2] In keeping

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[1] Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1982). The relevant substantive provisions of Title VII provide:

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id. § 2000e-2(a).

The purpose of Title VII is "to achieve equality of employment opportunities and remove barriers that have operated" unfavorably in the past against the enumerated minorities, *see* Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971), and "to make persons whole for injuries suffered on account of unlawful employment discrimination." Albermarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975); *see also* Bottini v. Sadore Management Corp., 764 F.2d 116, 119 (2d Cir. 1985) (goals of Title VII).

[2] 42 U.S.C. § 2000e-2(a) (1976). Although the provisions of Title VII appear broad and far-reaching, *see* 1 A. LARSON & L. LARSON, EMPLOYMENT DISCRIMINATION § 5.10 (1987) (summarizing provisions of Title VII and their broad application), the list is not to be extended beyond those factors specifically enumerated. *See, e.g.*, Sommers v. Budget Mktg., Inc., 667 F.2d 748, 750 (8th Cir. 1982) (transsexuality not embraced within protection of Title VII); DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327, 332 (9th Cir. 1979) (effeminacy not covered under Title VII); Smith v. Liberty Mut. Ins. Co., 569 F.2d 325, 326-27 (5th Cir. 1978) (same). *But see* Ulane v. Eastern Airlines, 28 F.E.P. 1438, 1438-39 (N.D. Ill. 1982) (Title VII protects transsexuals from discrimination).

In alleging Title VII violations, plaintiffs bear the initial burden of establishing a prima facie case of discrimination, *see* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973), by a preponderance of the evidence. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1980). A Title VII claim can be proven in two ways. *See* H. PERRITT, EMPLOYEE DISMISSAL LAW & PRACTICE § 2.3, at 29 (1984). The more difficult of the two is through the showing of an intent to discriminate. *See McDonnell Douglas*, 411 U.S. at 804-05. The alternate means is to proceed under the "disparate impact" theory, which requires a showing that persons characteristically similar to plaintiff were discriminated against, despite the apparent facial neutrality of the policy or practice. *See Griggs*, 401 U.S. at 430-31; *see generally Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1116-19 (1971) (general discussion of Title VII provisions and their application).

with the spirit of Title VII, Congress enacted the Age Discrimination in Employment Act of 1967 ("ADEA"),[3] prohibiting employers from discriminating on the basis of age against persons between the ages of forty and sixty-five.[4] Later amendments to the ADEA made the statute applicable to the states[5] and eliminated the up-

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Once the complainant successfully proves a prima facie case of discrimination, the burden of going forward then shifts to the employer to advance a nondiscriminatory reason for its actions. *See McDonnell Douglas*, 411 U.S. at 802. The employee, who continuously bears the burden of proof, must then show that the employer's proffered reasons were merely a pretext for the discriminatory conduct. *Id.* at 804.

Title VII provides several exemptions that permit otherwise unlawful discriminatory conduct. *See* H. PERRITT, *supra*, § 2.3, at 29. For instance, an employer may discriminate on the basis of religion, sex, or national origin if such "is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business," 42 U.S.C. § 2000e-2(e)(1) (1982), or "pursuant to a bona fide seniority or merit system." *Id.* § 2000e-2(h). Educational institutions owned or controlled by a religious organization may also selectively hire persons adhering to a particular religion. *Id.* § 2000e-2(e)(2).

The provisions of Title VII are to be liberally construed in favor of coverage. *See* Quijano v. University Fed. Credit Union, 617 F.2d 129, 131 (5th Cir. 1980) (quoting Parham v. Southwestern Bell Tel. Co., 433 F.2d 421, 425 (8th Cir. 1970)); Silver v. K.C.A., Inc., 586 F.2d 138, 141 (9th Cir. 1978).

[3] Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1982 & Supp. IV 1986).

[4] *Id.* § 623(a). The legislatively stated purpose of the ADEA is "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment." *Id.* § 621(b). In support of the enactment of the ADEA, Rep. Burke of Massachusetts opined that age discrimination results from assumptions made by employers regarding age and its effect on job performance. *See* 113 CONG. REC. H34,742 (1967) (statement of Rep. Burke). As with Title VII, *see supra* note 2, the ADEA should be liberally construed to effectuate its objectives as "remedial and humanitarian legislation." *See* Dartt v. Shell Oil Co., 539 F.2d 1256, 1260 (10th Cir. 1976), *aff'd*, 434 U.S. 99 (1977); Moses v. Falstaff Brewing Corp., 525 F.2d 92, 93 (8th Cir. 1975); Jackson v. Alcan Sheet & Plate, 462 F. Supp. 82, 87 (N.D.N.Y. 1978); Myers, *Employer Defenses Under the Age Discrimination in Employment Act—Ten Years After*, 1978 DET. C.L. REV. 573, 573-75.

In recommending the enactment of the ADEA, President Johnson noted that "[h]undreds of thousands not yet old, not yet voluntarily retired, find themselves jobless because of arbitrary age discrimination. . . . Opportunity must be opened to the many Americans over 45 who are qualified and willing to work. We must end arbitrary age limits on hiring." President Johnson's Older American Message of January 23, 1967, *reprinted in* 113 CONG REC. H34,743-44 (daily ed. Dec. 4, 1967).

Although the decision to impose an upper age limit of sixty-five was apparently based on the availability of social security retirement benefits at that age, the ADEA provisions and legislative history are silent in this regard. *See* C. EDELMAN & I. SIEGLER, FEDERAL AGE DISCRIMINATION IN EMPLOYMENT LAW—SLOWING DOWN THE GOLD WATCH 84 (1978). The lower age limit of forty, however, was found by Congress "to be the age at which age discrimination in employment becomes evident." 113 CONG. REC. H34,748 (1967) (statement of Rep. Dent).

[5] The Age Discrimination Act Amendments of 1974, Pub. L. No. 93-259, § 28(a)(2), 88

per age limit.[6] Recognizing the interests and needs of employers, Congress provided several exceptions to the ADEA, each allowing employers to differentiate based on age where it would otherwise be unlawful.[7] One such exception, perhaps the most frequently

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Stat. 55, 74 (codified as amended at 29 U.S.C. § 630(b)(2) (1982)). Although the 1974 amendments enlarged the definition of "employer" to encompass state and local governments, *see id.*, the statute originally applied solely to employers "engaged in an industry affecting commerce." Pub. L. No. 90-202, § 11(b), 81 Stat. 602, 605 (codified at 29 U.S.C. § 630(b) (1982)). In EEOC v. Wyoming, 460 U.S. 226, 243 (1983), the Supreme Court upheld extension of the ADEA to the states as a valid exercise of congressional power under the commerce clause. Interestingly, prior to *Wyoming*, several courts held the extension under the 1974 amendments unconstitutional. *See, e.g.*, Morgan v. Georgia Dep't of Rehabilitation, 3 E.B.C. 2478 (N.D. Ga. 1982) (state as separate sovereign has traditional perogative of selecting its servants and setting terms of their employment); Campbell v. Connelie, 542 F. Supp. 275 (N.D.N.Y. 1982) (federal regulation cannot reach state police services without violating the tenth amendment); Taylor v. Department of Fish & Game, 523 F. Supp. 514 (D. Mont. 1981) (commerce clause does not empower Congress to regulate working conditions of state employees).

[6] The Age Discrimination in Employment Act Amendments of 1986, Pub. L. No. 99-272, 100 Stat. 171 (codified at 29 U.S.C.A. § 631(a) (West Supp. 1988)). Prior to the 1986 amendments, the upper age limit was raised from sixty-five to "less than 70." *See* The Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 3(a), 92 Stat. 189. The effect of the 1978 amendments was to raise the upper age limit to less than seventy for most nonfederal employees, and eliminate the ceiling in its entirety for federal employees. *Id. See generally* Gitt, *The 1978 Amendments to the Age Discrimination in Employment Act—A Legal Overview*, 64 MARQ. L. REV. 607 (1981) (review of procedural and substantive changes resulting from 1978 amendments).

[7] *See* 29 U.S.C. § 623(f) (1982). The statute provides that an employer may take otherwise prohibited action:

> (1) . . . where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;
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> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan . . . ;
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> (3) to discharge or otherwise discipline an individual for good cause.

Id. See generally Rosenblum, *Age Discrimination in Employment and the Permissibility of Occupational Age Restrictions*, 32 HASTINGS L.J. 1261, 1264-69 (1981) (broad overview of exemptions available as defenses to employers).

Once plaintiff makes out a prima facie case under the ADEA, an employer seeking to avail itself of the statutory defense bears the burden of going forward with the evidence. *See* C. SULLIVAN, M. ZIMMER & R. RICHARDS, FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION § 11.5, at 736 (1980); *see also* Hodgson v. First Fed. Sav. & Loan Ass'n, 455 F.2d 818, 822 (5th Cir. 1972) ("burden shifts to the defendant to justify the existence of any disparities" once plaintiff proves prima facie case); EEOC v. New Jersey, 631 F. Supp. 1506, 1507 (D.N.J. 1986) (once plaintiff makes out prima facie case, burden shifts to employer to prove BFOQ), *aff'd*, 815 F.2d 694 (3d Cir. 1987); *cf.* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973) (burden shifts similarly in Title VII case). *But see* Laugesen v. Anaconda Co., 510 F.2d 307, 313 (6th Cir. 1975) (affirming refusal by district court to charge jury that

used by employers, is the bona fide occupational qualification ("BFOQ").[8] The BFOQ exception is narrowly construed and properly invoked only where age is a qualification "reasonably necessary to the normal operation of the particular business."[9] Employers in the law enforcement area defending ADEA challenges

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burden shifts once plaintiff makes prima facie showing). *See generally* Player, *Proof of Disparate Treatment Under the Age Discrimination in Employment Act: Variations on a Title VII Theme*, 17 GA. L. REV. 621 *passim* (1983) (plaintiff's burden of proof in ADEA case); Williams, *Age Discrimination: Involuntary Retirement Under the Age Discrimination in Employment Act*, 29 LAB. L.J. 391, 393-95 (1978) (in ADEA cases, burden of going forward borne by defendant once plaintiff makes prima facie showing).

[8] *See* Note, *Striking a Balance Between the Interests of Public Safety and the Rights of Older Workers: The Age BFOQ Defense*, 39 WASH. & LEE L. REV. 1371, 1373 (1982).

[9] 29 U.S.C. § 623(f)(1) (1982). The courts have fashioned a two-prong test in determining the merits of a BFOQ defense. *See infra* notes 33-54 and accompanying text. The two-prong test, enunciated in Usery v. Tamiami Trail Tours, 531 F.2d 224, 235-36 (5th Cir. 1976), and later adopted by the Supreme Court in Western Air Lines v. Criswell, 472 U.S. 400, 416-17 (1985), requires initially that the employer show the job qualifications adopted are "*reasonably necessary* to the essence of his business." *Id.* at 413 (quoting *Tamiami*, 531 F.2d at 236). The employer must then demonstrate the need to rely on age as a proxy for those qualifications by showing either that all or substantially all those above that age lack the qualifications, or that it is impractical or impossible "to deal with the older employees on an individualized basis." *Id.* at 414 (citing *Tamiami*, 531 F.2d at 235). An employer can prove the latter element by establishing "that some members of the discriminated-against class possess a trait precluding safe and efficient job performance that cannot be ascertained by means other than knowledge of the applicant's membership in the class." *Tamiami*, 531 F.2d at 235.

In *Criswell*, the Supreme Court recognized that the BFOQ exception in ADEA cases, like its analogue in Title VII, is " 'an extremely narrow exception to the general prohibition of age discrimination.' " *Criswell*, 472 U.S. at 412 (quoting Dothard v. Rawlinson, 433 U.S. 321, 334 (1977) (interpreting BFOQ exception under Title VII)); *accord* Air Line Pilots Ass'n v. Trans World Airlines, 713 F.2d 940, 951, 954 (2d Cir. 1983), *aff'd in part, rev'd in part sub nom.* Trans World Airlines v. Thurston, 469 U.S. 111 (1985); Orzel v. City of Wauwatosa Fire Dep't, 697 F.2d 743, 748 (7th Cir.), *cert. denied*, 464 U.S. 992 (1983); *see also* 3A A. LARSON & L. LARSON, *supra* note 2, § 100.12 (predicting, pre-*Criswell*, that Supreme Court would narrowly construe BFOQ exception in ADEA cases). Support for narrow construction of the BFOQ exception is also derived from the interpretive guidelines promulgated by the Equal Employment Opportunity Commission ("EEOC"), the agency charged with enforcement of the ADEA. *See* EEOC Interpretations of the ADEA, 29 C.F.R. § 1625.6(a) (1987). The EEOC regulations provide that the BFOQ defense "will have limited scope and application. Further, as this is an exception to the Act it must be narrowly construed." *Id.*; *see also* Casenote, *Age Discrimination in Employment Act — Judicial Interpretation of the Bona Fide Occupational Qualification Exception*, 52 J. AIR L. & COM. 773, 780-81 (1987) (narrow interpretation of BFOQ exception in ADEA suggested by congressional intent, EEOC regulations, similarity with Title VII, and case law). This narrow interpretation, in addition to the "objective" nature of the two-prong *Criswell* test, presents employers with a difficult burden in proving a BFOQ. *See id.* at 794-95. *But see* James & Alaimo, *BFOQ: An Exception Becoming the Rule*, 26 CLEV. ST. L. REV. 1 *passim* (1977) (discussing judicial misapplication of BFOQ test, resulting in unfulfillment of legislative goals).

usually justify mandatory retirement programs by relying on such factors as safety, job efficiency, and physical ability.[10] In evaluating the merits of an employer's BFOQ defense in this area, one factor to be considered is whether minimum health and fitness standards must be met by all employees.[11] Recently, however, in *EEOC v. Pennsylvania*,[12] the Court of Appeals for the Third Circuit narrowed the BFOQ exception by holding that the Pennsylvania State Police ("PSP") could not justify mandatory retirement at age sixty by relying on health and fitness as BFOQs unless all of its officers, regardless of age, were required to meet minimum health and fitness standards.[13]

In *EEOC v. Pennsylvania*, a Pennsylvania law mandated the retirement of PSP members reaching age sixty.[14] Lieutenant Otto J. Binker of the PSP commenced suit in the United States District Court for the Middle District of Pennsylvania in March, 1983, against both the Commonwealth of Pennsylvania and the PSP, seeking to enjoin his then imminent forced retirement.[15] Binker claimed that the state mandatory retirement statute violated the provisions of the ADEA, as well as the equal protection clause of

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[10] *See* Myers, *supra* note 4, at 586-87. Examples of cases upholding mandatory retirement schemes in the law enforcement area based on factors such as safety or physical ability include: EEOC v. Missouri State Highway Patrol, 748 F.2d 447, 455 (8th Cir. 1984) (lives and public safety depend on officers' performance and capabilities), *cert. denied*, 474 U.S. 828 (1985); EEOC v. New Jersey, 631 F. Supp. 1506, 1514 (D.N.J. 1986) (continued health and fitness of officers essential to law enforcement functions), *aff'd*, 815 F.2d 694 (3d Cir. 1987); Beck v. Borough of Manheim, 505 F. Supp. 923, 926 (E.D. Pa. 1981) (recognizing officers' need for stamina and ability to use physical force). *But see infra* note 30 and accompanying text (discussing inconsistencies among ADEA decisions involving mandatory retirement schemes).

[11] *See infra* notes 58-65 and accompanying text.

[12] 829 F.2d 392 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 1109 (1988).

[13] *Id.* at 395-96.

[14] *See id.* at 393. Pennsylvania's mandatory retirement law provides:

> Any member of the Pennsylvania State Police, except the Commissioner and Deputy Commissioner, regardless of rank, who has attained or who shall attain the age of sixty years, shall resign from membership in the said police force: Provided, however, That the provision of this paragraph shall not apply to members of the State Police Force who upon attaining the age of sixty years shall have less than twenty years of service. Upon completion of twenty years of service, the provision of this paragraph shall become applicable to such persons.

PA. STAT. ANN. tit. 71, § 65(d) (Purdon Supp. 1988). Many other states have similar mandatory retirement age statutes. *See, e.g.*, CAL. GOV'T CODE § 31662.6 (Deering Supp. 1988) (age sixty); MASS. GEN. L. ch. 32, § 26(3)(a) (1966) (age fifty-five); N.Y. RETIRE. & SOC. SEC. LAW § 370(b) (McKinney 1987) (age seventy).

[15] *See* EEOC v. Pennsylvania, 829 F.2d at 393.

the fourteenth amendment.[16]

Shortly thereafter, the EEOC brought a similar action on behalf of all persons adversely affected by the statute, seeking backpay and injunctive relief. This second action was consolidated with Binker's in May, 1983.[17] The Commonwealth and the PSP defended by asserting that mandatory retirement at age sixty constituted a BFOQ.[18]

The district court held in favor of defendants, finding that mandatory retirement at age sixty indeed constituted a BFOQ.[19] On appeal, the Third Circuit vacated the judgment, and remanded the action for further findings in light of the pronouncements made in two Supreme Court decisions rendered subsequent to the district court's decision.[20] On remand, District Judge Herman reviewed the supplementary evidence proffered and concluded that the PSP made a sufficient showing to prove the BFOQ defense.[21]

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[16] *See id.* at 393. Subsequent to the filing of the instant action, the Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, 100 Stat. 3342 (codified as amended at 29 U.S.C.A. § 623(i) (West Supp. 1987)), were enacted. These amendments provide, *inter alia*, for the lawful discharge of law enforcement officers on the basis of age pursuant to a bona fide retirement plan. *See id.* Since the provision became effective subsequent to the commencement of Binker's action, the court deemed it inapplicable. *See* EEOC v. Pennsylvania, 829 F.2d at 393 n.1. This statute, however, is self-repealing, and becomes ineffective on December 31, 1993. *See* 29 U.S.C.A. § 623 (West Supp. 1987). The effective time period is designed to afford the Secretary of Labor and EEOC sufficient time to conduct studies in this area. *See id.* § 622, *noted in* 1 Empl. Prac. Guide (CCH) ¶ 1147 (1987).

[17] *See* EEOC v. Pennsylvania, 829 F.2d at 393.

[18] *See id.* Defendants contended at the district court level that the age-sixty retirement mandate constituted a lawful BFOQ "reasonably necessary to the operation of the Pennsylvania State Police." EEOC v. Pennsylvania, 596 F. Supp. 1333, 1335 (M.D. Pa. 1984).

[19] *See* EEOC v. Pennsylvania, 596 F. Supp. at 1348. The district court rejected the EEOC's contention that mandatory retirement at age sixty is not a BFOQ since "a noticeable decrease in task performance occurs" prior to attainment of that age, *id.* at 1347, and stated that the focus should be whether the defendant had established a BFOQ, not whether an earlier age might be more appropriate. *Id.*

[20] *See* EEOC v. Pennsylvania, 768 F.2d 514, 518 (3d Cir. 1985). The Third Circuit noted that the United States Supreme Court rendered two decisions in ADEA cases on the eve of oral argument. *Id.* at 516. The two cases, Western Air Lines v. Criswell, 472 U.S. 400 (1985), and Johnson v. Mayor of Baltimore, 472 U.S. 353 (1985), clarified the BFOQ standard under the ADEA. *See* EEOC v. Pennsylvania, 768 F.2d at 516. In *Criswell*, the Supreme Court adopted the two-prong test enunciated by the Fifth Circuit in Usery v. Tamiami Trail Tours, 531 F.2d 224 (5th Cir. 1976). *See supra* note 9 and accompanying text (discussing both prongs of *Tamiami*). In *Johnson*, the Court held that the statutory scheme mandating retirement for federal law enforcement personnel and firefighters, *see* 5 U.S.C. § 8335(b) (1982), should not be accorded even persuasive weight in ADEA cases. *See Johnson*, 472 U.S. at 370-71.

[21] *See* EEOC v. Pennsylvania, 645 F. Supp. 1545, 1556 (M.D. Pa. 1986). After discussing the two prongs of the *Tamiami* test, *id.* at 1552-54, Judge Herman concluded that the

On appeal, the Third Circuit again vacated the district court's judgment and remanded the action, holding that physical health and fitness could not be relied upon as BFOQs until the PSP "developed, implemented and enforced" minimum health and fitness standards for officers of all ages.[22]

Writing for the court, Judge Seitz reviewed the district court's findings of fact under the "clearly erroneous" standard,[23] and noted that the PSP had no minimum fitness standards applicable to officers of all ages.[24] Observing that the district court failed to indicate the minimum qualifications necessary to adequately perform the duties of a PSP trooper,[25] the court held such a finding to

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job qualifications of "good health, physical strength, endurance, and dexterity are job qualifications reasonably necessary to the essence of the State Police business." EEOC v. Pennsylvania, 645 F. Supp. at 1554. In addition, the court held that forced "retirement at age 60 is a necessary proxy" for these qualifications. *Id.* at 1556.

[22] *See* EEOC v. Pennsylvania, 829 F.2d at 395-96. In holding that minimum standards must be required of all officers before relying on health and fitness to support a BFOQ, the court distinguished EEOC v. New Jersey, 631 F. Supp. 1506 (D.N.J. 1986), *aff'd*, 815 F.2d 694 (3d Cir. 1987), which upheld New Jersey's mandatory retirement of its state police officers at age fifty-five against an ADEA challenge. *See* EEOC v. Pennsylvania, 829 F.2d at 395-96. The critical distinguishing factor, according to the court, was New Jersey's requirement that all of its officers meet mandatory fitness standards or be subject to sanctions, whereas the PSP had not yet established any such standards. *Id.*

[23] EEOC v. Pennsylvania, 829 F.2d at 394. Since the existence of a BFOQ is a question of fact, *see* Galvin v. Vermont, 598 F. Supp. 144, 149 (D. Vt. 1984), review of the district court's finding is governed by the "clearly erroneous" standard, as mandated by the Federal Rules of Civil Procedure. *See* FED. R. CIV. P. 52(a) ("[f]indings of fact shall not be set aside unless clearly erroneous"); *see also* Anderson v. Bessemer City, 470 U.S. 564, 573 (1985) (" 'finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed' ") (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)); Inwood Laboratories v. Ives Laboratories, 456 U.S. 844, 855 (1982) (recognizing *United States Gypsum* test); Double H Plastics, Inc. v. Sonoco Prods. Co., 732 F.2d 351, 354 (3d Cir.) (same), *cert. denied*, 469 U.S. 900 (1984). *See generally* C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2585 (1971 & West Supp. 1986) (discussing "clearly erroneous" standard).

In reviewing district courts' findings, the Third Circuit has held that a factual determination made by a lower court should be upheld unless it "(1) is completely devoid of minimum evidentiary support displaying some hue of credibility, or (2) bears no rational relationship to the supportive evidentiary data." Krasnov v. Dinan, 465 F.2d 1298, 1302 (3d Cir. 1972). For an example of an appellate court applying the "clearly erroneous" standard in an ADEA case challenging mandatory retirement of police officers, see EEOC v. City of East Providence, 798 F.2d 524, 530-31 (1st Cir. 1986).

[24] *See* EEOC v. Pennsylvania, 829 F.2d at 395.

[25] *See id.* The court noted that the lower court's findings were relevant only to the health, as opposed to fitness, levels of PSP officers. *Id.* Accordingly, the court held it was "clear error" for the trial court to conclude that a BFOQ defense had been proven in the absence of factual findings concerning minimum fitness requirements. *See id.* In so holding,

be a requisite element of the defense[26] despite the absence of a specific requirement in the ADEA.[27] Judge Seitz concluded that in order for a particular characteristic to be a BFOQ, the employer must require it of all employees.[28] In so concluding, the Third Circuit expressly rejected the First Circuit's reasoning and contrary decision in *EEOC v. City of East Providence*.[29]

It is submitted that the considerable confusion created by the decisions of the federal courts in this area[30] has been exacerbated by the Third Circuit's excessive narrowing of the BFOQ exception. While the court's application of the test approved by the Supreme Court in *Western Air Lines v. Criswell*[31] is laudable, it is suggested that it created an overly stringent standard for employers to meet. In holding that employers must require minimum health and fitness levels of all their employees in order to establish a BFOQ defense,[32] the court imposed an additional element in the proof of the defense rather than using this factor merely as an evidentiary consideration. It is submitted that the imposition of this additional

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the court found that the PSP failed to satisfy the first prong of the *Criswell* test, *see supra* note 9 and accompanying text, whereby an employer must show that the qualification is "reasonably necessary" to his business. *See* EEOC v. Pennsylvania, 829 F.2d at 395.

[26] *See* EEOC v. Pennsylvania, 829 F.2d at 396.

[27] *See id.* at 395.

[28] *See id.* at 396. In so concluding, the court observed that the district court failed to find that younger officers possessed these purported BFOQ traits, and remarked that "in fact, the record suggests the contrary." *Id.*

[29] *See id.* In EEOC v. City of East Providence, 798 F.2d 524 (1st Cir. 1986), the court held that East Providence's failure to impose minimum fitness standards on all members of its police force did not preclude it from successfully invoking the BFOQ defense. *See id.* at 531. The court determined that the absence of such standards does not necessarily lead to the conclusion that "physical fitness is not a reasonably necessary job qualification," *id.* at 530, and noted that the defendants' belief that "*most* of the younger officers will meet the necessary minimums" would be sufficient. *Id.* at 529 n.4. The First Circuit concluded that the city had made a sufficient showing to support its BFOQ defense that age-sixty mandatory retirement of its police officers from regular duty is "reasonably necessary" to the safe operation of its police force. *Id.*

[30] *See* Note, *Age Discrimination and Police Employment Practices*, 4 HOFSTRA LAB. L.J. 153, 176-77 (1986) (noting inconsistencies among decisions involving mandatory retirement practice). Courts have reached opposite results when faced with ADEA challenges in the law enforcement area, thus creating inconsistencies among the jurisdictions. *See* EEOC v. City of Bowling Green, 607 F. Supp. 524, 527 (W.D. Ky. 1985). These anomalous results have even created inconsistencies within the same state. *Compare* Beck v. Borough of Manheim, 505 F. Supp. 923, 927 (E.D. Pa. 1981) (age-sixty mandatory retirement of Manheim, Pennsylvania police officers upheld) *with* EEOC v. Pennsylvania, 829 F.2d at 396 (age-sixty mandatory retirement of Pennsylvania State Police members struck down).

[31] 472 U.S. 400 (1985); *see also supra* note 9 and accompanying text.

[32] *See* EEOC v. Pennsylvania, 829 F.2d at 395, 396.

element unfairly places an onerous burden on employers seeking to justify mandatory retirement policies. This Comment will examine the judicial development of the standard adopted by the Supreme Court in *Criswell* for analyzing the BFOQ defense,[33] and will suggest that the Third Circuit's decision improperly set stricter requirements than those contemplated by the *Criswell* Court. This Comment will further suggest that had the court viewed the absence of uniform health and fitness standards merely as evidence that no BFOQ had been established, the district court's decision would have been affirmed in light of the "clearly erroneous" standard.

DEVELOPMENT OF THE TWO-PRONG BFOQ TEST

Although mandatory retirement schemes may withstand equal protection challenges if merely rationally related to a legitimate state objective,[34] the courts have developed a more stringent two-prong test in assessing the validity of an employer's BFOQ defense in ADEA cases.[35] That test, recently endorsed by the Supreme Court in *Western Air Lines v. Criswell*,[36] was articulated in the seminal Fifth Circuit decision of *Usery v. Tamiami Trail Tours*.[37] In *Tamiami*, the court drew upon two of its earlier Title VII decisions to formulate the applicable standard in analyzing the BFOQ defense.[38] According to *Tamiami* and *Criswell*, an employer seek-

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[33] *See infra* notes 36-51 and accompanying text.

[34] *See* C. EDELMAN & I. SIEGLER, *supra* note 4, at 49 ("a very pessimistic picture [exists] for those who choose to, or must, rely on a constitutional or equitable challenge to age discrimination in employment"). So long as the age classification is "rationally related to furthering a legitimate state interest," compulsory retirement programs will be upheld against equal protection challenges. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976) (mandatory retirement of state police officers rationally related to state's interest in protecting public by assuring physical preparedness); *see also* Popkins v. Zagel, 611 F. Supp. 809, 813 (C.D. Ill. 1985) (mandatory retirement of state police officers not violative of equal protection clause since state statute has "rational basis"); *cf.* Arritt v. Grisell, 567 F.2d 1267, 1271-72 (4th Cir. 1977) (eighteen to thirty-five age limit for police applicants not violative of equal protection clause under rational basis analysis). Since age classification neither interferes with the exercise of a fundamental right nor is disadvantageous to a suspect class, strict scrutiny is not applied in such cases. *Murgia*, 427 U.S. at 312-14.

[35] *See supra* note 9; *see generally* Comment, *The Age Discrimination in Employment Act Amendments of 1978: A Legal and Economic Analysis*, 7 PEPPERDINE L. REV. 85 (1979) (courts apply "a more protective standard" in ADEA cases).

[36] 472 U.S. 400 (1985).

[37] 531 F.2d 224 (5th Cir. 1976).

[38] *See id.* at 235-37. The first prong of the *Tamiami* standard, that the qualification be reasonably necessary to the essence of the particular business, was derived from an earlier

ing to justify age discrimination based on certain job qualifications must show, first, that the qualifications are "*reasonably necessary* to the essence of his business,"[39] and, second, that he "is compelled to rely on age as a proxy" for these qualifications.[40]

The first prong of this judicially created "reasonably necessary" test is significantly more stringent than the mere "rational basis" standard.[41] Support for this stricter standard is found in cases interpreting a similar BFOQ provision contained in Title VII,[42] as well as in pronouncements of the Equal Employment Op-

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Title VII case emanating from the Fifth Circuit. *See* Diaz v. Pan Am. World Airways, 442 F.2d 385, 388 (5th Cir.) (invalidating employer policy of refusing to hire male flight attendants since essence of airline business is safe transportation), *cert. denied*, 404 U.S. 950 (1971). The first prong takes "safety factors" into consideration. *See Tamiami*, 531 F.2d at 235-36. The *Tamiami* court, in evaluating a bus company's asserted BFOQ defense, noted that safe transportation was the essence of the employer's business, and concluded that "[t]he greater the safety factor, measured by the likelihood of harm and the probable severity of that harm in case of an accident, the more stringent may be the job qualifications designed to ensure safe driving." *Id.* at 236. The second prong, which requires a showing that the employer is compelled to rely on age as a proxy for the job qualification, finds its roots in Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235-36 (5th Cir. 1969). The *Weeks* court held that a policy of refusing to hire women for a job which called for strenuous activity violated Title VII. *Id.*; *see also Tamiami*, 531 F.2d at 235-36 (explaining *Weeks* and *Diaz*).

[39] *See Tamiami*, 531 F.2d at 236.

[40] *See Criswell*, 472 U.S. at 414 (discussing and endorsing the *Tamiami* standard).

[41] *See* Iervolino v. Delta Air Lines, 796 F.2d 1408, 1416-17 (11th Cir. 1986) (noting and adhering to *Criswell* rejection of "reasonable" standard in analyzing first prong), *cert. denied*, 107 S. Ct. 1300 (1987); Orzel v. City of Wauwatosa Fire Dep't, 697 F.2d 743, 749-50 (7th Cir.) (mandatory retirement schemes under ADEA must meet stricter "reasonably necessary" standard (citing Tuohy v. Ford Motor Co., 675 F.2d 842, 845-46 (6th Cir. 1982))), *cert. denied*, 464 U.S. 992 (1983); *cf.* Harriss v. Pan Am. World Airways, 649 F.2d 670, 677 (9th Cir. 1980) ("reasonably necessary" not equivalent to "reasonable" as applied to BFOQ defense in Title VII sex discrimination context). *But see* Popkins v. Zagel, 611 F. Supp. 809, 813 (C.D. Ill. 1985) (first prong in analyzing BFOQ defense satisfied by rational basis); Mahoney v. Trabucco, 574 F. Supp. 955, 958 (D. Mass. 1983) ("reasonableness" analysis, similar to that used in equal protection analysis, applicable in determining BFOQ defense), *rev'd on other grounds*, 738 F.2d 35 (1st Cir.), *cert. denied*, 469 U.S. 1036 (1984). *See generally* Casenote, *supra* note 9, at 792-95 (discussing distinction between "reasonably necessary" and "reasonableness" standards in light of *Criswell* endorsement of more stringent standard).

[42] *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 332-34 (1977) (BFOQ exception in sex discrimination cases to be construed narrowly); Diaz v. Pan Am. World Airways, 442 F.2d 385, 388 (5th Cir.) (in sex discrimination context, "reasonably necessary" requires business *necessity*, not merely *convenience*, to establish BFOQ defense), *cert. denied*, 404 U.S. 950 (1971). Courts in ADEA cases have generally recognized the similarities between Title VII and the ADEA, *see, e.g.*, Trans World Airlines v. Thurston, 469 U.S. 111, 121 (1985) (Title VII interpretations equally applicable to ADEA since substantive provisions of ADEA derived from Title VII), and have followed the principles set forth in Title VII decisions. *See* Recent Developments, *The Bona Fide Occupational Qualification Exception—Clarifying the Meaning of "Occupational Qualification,"* 38 VAND. L. REV. 1345, 1349 (1985) (ADEA

portunity Commission.[43]

Whereas the first prong is analyzed under the "reasonably necessary" test,[44] a less stringent "reasonableness" standard applies when assessing the second prong.[45] This reasonableness standard may be satisfied in one of two ways. It may be shown that either a factual basis exists for believing that all, or substantially all, of the affected persons are unable to efficiently or safely perform the job,[46] or, in the alternative, that it is highly impractical or impossible to deal with those employees on an individualized basis.[47]

In reaching its decision in *Criswell*, the Supreme Court noted that the BFOQ exception to the ADEA, like its analogue in Title VII, is properly viewed as an " 'extremely narrow exception to the general prohibition' of age discrimination,"[48] thus mandating a

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case law has followed BFOQ standard developed in Title VII cases). *But see* Laugesen v. Anaconda Co., 510 F.2d 307, 312 (6th Cir. 1975) (inappropriate to perfunctorily apply Title VII precedents to ADEA claims in light of separate enactment of statutes); Note, *The Age Discrimination in Employment Act of 1967*, 90 HARV. L. REV. 380, 411 (1976) (recommending courts to look at distinctive characteristics of age discrimination which may justify differing standards for ADEA as opposed to Title VII actions). *See generally* Casenote, *The Constitutionality of the ADEA After Usery*, 30 ARK. L. REV. 363, 372-75 (1976) (ADEA and Title VII share "[i]mportant similarities"); Comment, *Adjudicating ADEA Disparate Treatment Claims Within the Evidentiary Framework of Title VII: An Order of Proof for Age Discrimination Cases*, 32 CATH. U.L. REV. 865 *passim* (1983) (discussing similarities in allocation of burden of proof in ADEA and Title VII cases).

[43] *See* EEOC Interpretations of the ADEA, 29 C.F.R. § 1625.6(b) (1987). The EEOC's interpretive guidelines provide in pertinent part that:

> An employer asserting a BFOQ defense has the burden of proving that (1) the age limit is reasonably necessary to the essence of the business, and either (2) that all or substantially all individuals excluded from the job involved are in fact disqualified, or (3) that some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by reference to age. If the employer's objective in asserting a BFOQ is the goal of public safety, the employer must prove that the challenged practice does indeed effectuate that goal and that there is no acceptable alternative which would better advance it or equally advance it with less discriminatory impact.

Id.

[44] *See supra* note 41 and accompanying text.

[45] *See* Casenote, *supra* note 9, at 785.

[46] *See* Western Air Lines v. Criswell, 472 U.S. 400, 414 (1985).

[47] *Id.* In enacting the ADEA's 1978 amendments, Congress implicitly approved of this two-part inquiry under the second prong of the *Tamiami* standard as evidenced by a proposed amendment adopted by the Senate, but later rejected by the Conference Committee. *See id.* at 415 (quoting S. REP. No. 95-493, 95th Cong., 2d Sess. 3, *reprinted in* 1978 U.S. CODE & CONG. ADMIN. NEWS 504, 513-14).

[48] *Criswell*, 472 U.S. at 412 (quoting Dothard v. Rawlinson, 433 U.S. 321, 334 (1977) (construing BFOQ exception under Title VII)). Since the ADEA is considered "remedial, humanitarian legislation" to be broadly construed, *see supra* note 4, any exceptions, such as

fact-specific, case-by-case analysis.[49] By adopting the *Tamiami* approach as the framework for analyzing the merits of a BFOQ defense, it is suggested that the Supreme Court manifested its approval of a strict standard of proof in this area,[50] thereby demonstrating the Court's reluctance to uphold the defense except in limited, perhaps exceptional, circumstances.[51]

While ADEA decisions involving mandatory retirement schemes in the law enforcement area have consistently applied the two-prong standard in evaluating the merits of a BFOQ defense,[52] the quantum of proof required is less than settled.[53] At a mini-

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the BFOQ, are to be narrowly construed. *See supra* note 9. This narrow construction is similar to that applied in earlier cases interpreting the exemptions under the Fair Labor Standards Act ("FLSA"). *See, e.g.*, Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392 (1960) (citing Mitchell v. Kentucky Fin. Co., 359 U.S. 290, 295 (1959) (recognizing well-settled approach of narrow construction accorded FLSA exemptions)).

[49] *See* EEOC Interpretations of the ADEA, 29 C.F.R. § 1625.6(a) (1987) (calling for case-by-case analysis of BFOQ determinations); Myers, *supra* note 4, at 589 ("stereotyping" is not sufficient ground for defense and must use case-by-case analysis). The congressional findings gleaned from the ADEA's legislative history lend support to the view that a case-by-case analysis is required in construing the statute's provisions. *See* H.R. REP. No. 805, 90th Cong., 1st Sess. 2, *reprinted in* 1967 U.S. CODE CONG. & ADMIN. NEWS 2213, 2220. In summarizing the ADEA's major provisions, the House Report provides that "[t]he case-by-case basis should serve as the underlying rule in the administration of the legislation. Too many different types of situations in employment occur for the strict application of general prohibitions and provisions." *Id.*

[50] *See* Casenote, *supra* note 9, at 794-95 (discussing ramifications of Supreme Court's adoption of stringent "reasonably necessary" standard). The "reasonably necessary" standard adopted by the Supreme Court in *Criswell* furthers the legislative intent behind the ADEA, *see supra* note 4, and follows well-settled case law developed by the district and circuit courts. *See* Casenote, *supra* note 9, at 793-94.

[51] *See* Casenote, *supra* note 9, at 794.

[52] *See, e.g.*, EEOC v. Pennsylvania, 829 F.2d at 394-95 (state police troopers); EEOC v. City of East Providence, 798 F.2d 524, 528 (1st Cir. 1986) (city police officers); EEOC v. Missouri State Highway Patrol, 748 F.2d 447, 449 (8th Cir. 1984) (state highway patrol), *cert. denied*, 474 U.S. 828 (1985); Mahoney v. Trabucco, 738 F.2d 35, 37 (1st Cir.) (state police officers), *cert. denied*, 469 U.S. 1036 (1984); EEOC v. County of Santa Barbara, 666 F.2d 373, 376 (9th Cir. 1982) (county corrections officers); EEOC v. New Jersey, 631 F. Supp. 1506, 1514 (D.N.J. 1986) (state police officers), *aff'd*, 815 F.2d 693 (3d Cir. 1987); Popkins v. Zagel, 611 F. Supp. 809, 813 (C.D. Ill. 1985) (same). Courts faced with ADEA challenges involving maximum hiring ages for law enforcement personnel have similarly applied the two-prong standard. *See, e.g.*, EEOC v. University of Texas Health Science Center, 710 F.2d 1091, 1093 (5th Cir. 1983) (maximum hiring age of forty-five); EEOC v. City of Linton, 623 F. Supp. 724, 725 (S.D. Ind. 1985) (maximum hiring age of thirty-five); Hahn v. City of Buffalo, 596 F. Supp. 939, 945 (W.D.N.Y. 1984) (maximum hiring age of twenty-nine), *aff'd*, 770 F.2d 12 (2d Cir. 1985).

[53] *See* Note, *supra* note 30, at 168-77. In determining the amount of proof required in the law enforcement area, some courts have undertaken a balancing test, weighing the extent and inevitability of the risk of harm to which fellow employees and the public generally are exposed. *See, e.g.*, Beck v. Borough of Manheim, 505 F. Supp. 923, 925 (E.D. Pa. 1981)

mum, however, courts require law enforcement employers to proffer objective, factual evidence demonstrating that one's ability to effectively perform the duties of a police officer declines with age.[54] Such evidence is typically introduced in the form of expert testimony, statistical data, and testimony of police officers.[55]

In holding that the PSP could not establish a BFOQ in the absence of minimum health and fitness standards imposed upon all officers, it is suggested that the Third Circuit took an extreme position in light of the developed standard of proof, and unnecessarily injected an additional element into the first prong of the *Tamiami* standard.

PHYSICAL MONITORING AT ALL AGES: A FACTOR CONSIDERED OR AN ELEMENT OF THE DEFENSE?

In its earlier opinion ordering remand,[56] the court in *EEOC v. Pennsylvania* was troubled by the fact that the physical fitness of officers of all ages was not monitored on a regular basis.[57] However, case law addressing this issue, though sparse, indicates that this fact standing alone should not preclude an employer from estab-

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(lesser amount of proof required to justify mandatory retirement of officers where risk of harm to public and fellow employees is great if age requirement eliminated); *cf.* Aaron v. Davis, 414 F. Supp. 453, 461 (E.D. Ark. 1976) (same, firefighters).

Consequently, courts have reasoned that the presence of safety factors going to the essence of an employer's business lessens the employer's burden of proving age as a BFOQ. *See, e.g.*, EEOC v. County of Santa Barbara, 666 F.2d at 377 (involving mandatory retirement of corrections officers); *Hahn*, 596 F. Supp. at 945 (involving maximum hiring age of police officers); *cf.* Orzel v. City of Wauwatosa Fire Dep't, 697 F.2d 743, 755 (7th Cir.) (mandatory retirement of firefighters), *cert. denied*, 464 U.S. 992 (1983); Tuohy v. Ford Motor Co., 675 F.2d 842, 845 (6th Cir. 1982) (mandatory retirement of pilots); Hodgson v. Greyhound Lines Inc., 499 F.2d 859, 863 (7th Cir. 1974) (maximum hiring age for bus drivers), *cert. denied*, 419 U.S. 1122 (1975).

[54] *See* EEOC v. County of Santa Barbara, 666 F.2d at 376 ("subjective assertion[s] that older people are unable to perform" job tasks are insufficient); *University of Texas Health Science Center*, 710 F.2d at 1094 (employer must show "specific, objective or factual basis").

[55] *See, e.g.*, EEOC v. City of East Providence, 798 F.2d at 530 (testimony of police officers); *Missouri State Highway Patrol*, 748 F.2d at 451 (testimony of cardiologist, physiologist, physician, and retired police officers); *University of Texas Health Science Center*, 710 F.2d at 1095 (testimony of medical doctor, police chiefs, and industrial psychologist); *cf.* EEOC v. City of Bowling Green, 607 F. Supp. 524, 526 (W.D. Ky. 1985) (testimony of medical school professor cardiologist profferred by EEOC rather than employer). In litigating employment discrimination cases, it has been suggested that experts should be utilized to provide the necessary facts and analysis upon which a judicial decision may be properly based. *See* Lopez, *The Expert Witness in EEO Litigation*, 5 EMPLOYEE REL. L.J. 197, 198-99 (1979) (advocating use of professional psychologists in EEO cases).

[56] *See* EEOC v. Pennsylvania, 768 F.2d 514, 518 (3d Cir. 1985).

[57] *See id.*

lishing a BFOQ based on health and fitness; indeed, rather than being dispositive of the BFOQ issue per se, most courts have held that it is merely a factor to be considered in the analysis.[58]

For example, in *EEOC v. City of East Providence*,[59] the First Circuit rejected the EEOC's contention that regular physical fitness monitoring of all officers is necessary in order to prove the existence of a BFOQ.[60] The court reasoned that simply because a police department is neglectful in the physical fitness monitoring of its younger officers does not mean it should not be precluded from asserting that such characteristics are reasonably necessary to the maintenance of an effective police force.[61] The Seventh Circuit, in *Heiar v. Crawford County*,[62] also considered the absence of periodic physical examinations of the officers of a sheriff's department.[63] Although the court found an ADEA violation, Judge Posner noted that regular fitness testing is "very far from being infallible, and this fact can be used to *support* a mandatory retirement age."[64] Other district and circuit courts are in accord with this view.[65]

THE DISTRICT COURT'S FINDINGS WERE NOT CLEARLY ERRONEOUS

In reaching its decision, the district court considered the ab-

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[58] *See, e.g.*, EEOC v. City of East Providence, 798 F.2d 524, 530-31 (1st Cir. 1986) (absence of regular physical fitness monitoring does not preclude finding BFOQ); EEOC v. Missouri State Highway Patrol, 748 F.2d 447, 453-55 (8th Cir. 1984) (noting district court's erroneous emphasis on lack of such a program), *cert. denied*, 474 U.S. 828 (1985); Heiar v. Crawford County, 746 F.2d 1190, 1198 (7th Cir. 1984) (fact that physical testing is fallible can be supportive of mandatory retirement scheme, though absence of testing is "telling bit of evidence" against finding BFOQ), *cert. denied*, 472 U.S. 1027 (1985); EEOC v. New Jersey, 631 F. Supp. 1506, 1508 (D.N.J. 1986) (annual fitness testing is persuasive evidence of state police force's concern with health and fitness), *aff'd*, 815 F.2d 694 (3d Cir. 1987); EEOC v. City of Bowling Green, 607 F. Supp. at 525 (in granting preliminary injunction against city, court noted absence of fitness testing as evidence against finding BFOQ); *cf.* EEOC v. City of Linton, 632 F. Supp. 724, 725-26 (S.D. Ind. 1985) (noting lack of regular fitness testing in granting summary judgment against employer who failed to proffer "scintilla of evidence" supporting BFOQ defense).

[59] 798 F.2d 524 (1st Cir. 1986).

[60] *See id.* at 531.

[61] *See id.* at 530.

[62] 746 F.2d 1190 (7th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985).

[63] *See id.* at 1198.

[64] *Id.* (emphasis added). Judge Posner went on to state, however, that the fallibility of fitness tests standing alone is insufficient to support a BFOQ, and that it only becomes significant as "to the consequences of retaining a physically unfit employee." *Id.*

[65] *See supra* note 58 and accompanying text.

sence of health and fitness monitoring as evidence in its analysis.[66] After assessing the probative value of all the evidence brought forward, the court found that the PSP sufficiently proved its BFOQ defense.[67] The plethora of evidence adduced, it is submitted, provided sufficient evidentiary support for the court's findings that good health, fitness, endurance, and strength are reasonably necessary qualifications for the successful operation of the PSP, and that age is a necessary proxy for these qualifications.[68] Had the Third Circuit viewed the absence of health and fitness standards merely as evidence, the district court's findings would have been affirmed under the clearly erroneous standard since they were not without minimum evidentiary support.[69]

CONCLUSION

In evaluating the merits of an employer's BFOQ defense, courts have developed a stringent two-prong analysis, recently endorsed by the Supreme Court. Employers in the law enforcement area often seek to justify mandatory retirement practices based on health and fitness considerations. In applying the two-part analysis to these cases, courts have considered the presence or absence of uniform health and fitness monitoring as a factor. This Comment has suggested that the Third Circuit went beyond that position by requiring health and fitness monitoring of all officers before a BFOQ can be established. Such an approach, it is submitted, places an undue burden on employers seeking to justify mandatory retirement programs. This Comment has further suggested that had the Third Circuit viewed the absence of health and fitness monitoring merely as an evidentiary consideration, the district court's decision would have been affirmed under the "clearly erroneous" standard.

James M. Wicks

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[66] *See* EEOC v. Pennsylvania, 645 F. Supp. 1545, 1553 (M.D. Pa. 1986).

[67] *See id.* at 1556.

[68] *See id.* at 1547-52, 1556. For an overview of the facts and evidence presented before the district court, see Brief for Appellee Pennsylvania State Police at 4-12, EEOC v. Pennsylvania, 829 F.2d at 392 (Nos. 86-5807, 86-5902), and Brief for Appellant Equal Employment Opportunity Commission at 6-17, EEOC v. Pennsylvania, 829 F.2d at 392 (Nos. 86-5807, 86-5902).

[69] *See supra* note 23 (discussing "clearly erroneous" standard of review).